IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*,

v.

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a E. AND R. SHANNON, *Appellees*.

Appeal From The United States District Court For The Western District Of Texas, San Antonio Division

STATEMENT AS TO JURISDICTION

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OPINIONS BELOW

The District Court's opinion is published in ___ F. Supp. ___, the report of the Interstate Commerce Commission in 81 M.C.C. 337. The United States and the Commission are taking a joint appeal from the same judgment from which this appeal is taken, and the copy of the District Court's opinion to be attached to their jurisdictional statement is incorporated herein by reference.

NATURE OF THE PROCEEDING

This action was brought by appellees in the District Court under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to set aside an order of the Interstate Commerce Commission.

JUDGMENT BELOW

The District Court's final judgment setting aside the order was dated and entered May 1, 1963. Notice of appeal was filed in that Court by these appellants June 27, 1963.

STATUTORY BASIS FOR JURISDICTION

Jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U.S.C. §§ 1253, 2101(b).

CASES SUSTAINING JURISDICTION

The following cases sustain this Court's jurisdiction: *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81 (1961); *American Trucking Associations* v. *United States*, 355 U.S. 141, 153 (1957); *Alton Railroad Company* v. *United States*, 315 U.S. 15, 18-20 (1942).

STATUTES INVOLVED

National Transportation Policy
49 U.S.C. preceding §§ 1,
301, 901 and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe,

adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(c) of the Interstate Commerce Act (49 U.S.C. 303), 72 Stat. 568, 574.

"Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

QUESTION PRESENTED

Whether the District Court erred in setting aside the Commission's finding that the appellees' transportation of sugar was unauthorized for-hire transportation, rather than bona fide private carriage "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the appellees, within the meaning of Section 203(c) of the Interstate Commerce Act, where the appellees' "purchase" and transportation of sugar was largely related to the availability of unused capacity on the return movement of their trucks utilized outbound in bona fide private carriage of other commodities, and where the sugar was usually delivered to the ultimate consumers without warehousing.

STATEMENT OF THE CASE

The Commission instituted on its own motion an investigation of appellees' operations. After hearing, the Commission found that appellees were engaging without authority as interstate motor common or contract carriers of sugar and ordered them to cease and desist. Upon suit by appellees the District Court set aside the order, and from that judgment separate appeals have been taken (1) by the United States and the Commission and (2) by these appellants.

Appellants are authorized motor common carriers of property, railroads, and two associations of motor common carriers.* They were permitted to intervene in the District Court in support of the Commission's order under 28 U.S.C. § 2323. As originating or connecting lines the common carriers are engaged in hauling sugar in the area of appellees' sugar transportation operations.

*Appellants are listed in Appendix A.

Appellees have an office and warehouse at San Antonio, Texas, where they have been engaged for many years in buying and selling livestock, grain, fertilizer, molasses, and salt. In connection with this business they operate seven trucks, carrying these commodities to and from their warehouse and making some deliveries to customers. These truck operations are not in controversy. (81 M.C.C. p. 341).

After transportation of livestock in their own trucks to southern Louisiana, appellees since 1954, have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, also in southern Louisiana, and transporting and selling it to purchasers, the majority of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2 per cent discount if payment is made within 10 days, and the sales by appellees at San Antonio are made on the same terms. The sugar is customarily loaded at the refinery and moved directly to and unloaded at the purchasers' places of business. Appellees' sugar sales are usually made after the sugar is en route from Louisiana, but whenever sugar transportation is not coordinated with a truck movement from San Antonio to Louisiana the sugar transportation is performed to fill an order obtained in advance. Sometimes appellees employ motor common carriers to haul commodities they handle, but they have never used common carriers to haul sugar. (id. pp. 341-342). Appellees admit that their principal reason for purchasing sugar in Louisiana is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio. (id. pp. 343, 346).

THE QUESTION PRESENTED IS SUBSTANTIAL

This case brings to the Court for the first time the construction and application of the 1958 amendment to § 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c), 72 Stat. 568, 574. Section 203(c), with the 1958 amendment in italics, is the following:

> "Sec. 203. (c) Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, *nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.*"

The District Court ignored § 203(c), did not apply it and made no comment upon it, despite the plain fact that it was intended to prevent evasion of the licensing provisions of the Act by the use of the buy and sell type of operations employed by appellees here. As this Court observed in *United States* v. *Drum*, 368 U.S. 370, 375 note 12 (1962), the amendment was "designed to curb so-called 'buy-sell' evasions by purported or 'pseudo' private carriers. * * * See S. Rep. No. 1647, 85 Cong., 2d Sess. 23-24; H.R. Rep. No. 1922, 85th Cong., 2d Sess. 17-19."

The Transportation Act of 1958, embracing, among others, the instant amendment to the Interstate Com-

merce Act, was designed to aid the nation's common carrier system. Speaking of the bill which became law the House Committee Report[1] said, "The purpose of this bill is to amend the Interstate Commerce Act in order to strengthen and improve our nation's common carrier surface transportation system so that it may better fulfill its roll in meeting the transportation needs of the nation's expanding economy and the requirement of national defense."

And commenting upon that section of the 1958 Act which added the language here at issue, the Report[2] used this significant language:

> "The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of 'pseudo-private carriage' by truck. One of the subterfuges most commonly used in this type of carriage is the 'buy-and-sell' arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.
>
> "In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually

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[1] HR Rep. No. 1922, 85th Cong., 2d Sess., P. 2.

[2] Id., P. 17-18.

performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

"This pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier."

It is clear that appellees' carriage of sugar is a transportation business. It is a steady stream of transportation from manufacturer direct to user. (81 M.C.C. p. 342).

Such transportation business is not "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of appellees. Appellees have a non-transportation "primary business enterprise" at San Antonio and they perform certain truck transportation within its scope and in furtherance of it. But the sugar transportation is a separate business, and is a transportation business. In actuality the only service appellees perform in respect to sugar is transportation. It would be hard to devise a clearer violation of § 203 (c) than this.

The interest of the nation's common carriers, recognized by Congress in the 1958 amendment to the Inter-

state Commerce Act, is involved. The public concern manifested by Congress has been given no consideration by the Court below and warrants careful measurement in determining the status of the transportation involved.

The District Court did not take into consideration the clear evidence that the sugar transportation is a separate enterprise, which is wholly transportation. Instead, the Court lumped the San Antonio warehouse-dealer business and the sugar transportation together in total disregard of § 203 (c) whose language compels that they be considered separately.

CONCLUSION

The question presented is so substantial as to require plenary consideration by the Court.

Respectfully submitted,

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August 26, 1963

APPENDIX A

The following intervening defendants do hereby participate in this Jurisdictional Statement:

(1) Red Ball Motor Freight, Inc.
(2) Brown Express, Inc.
(3) Texas-Arizona Motor Freight, Inc.
(4) Central Freight Lines, Inc.
(5) The Atchison, Topeka and Santa Fe Railway Company
(6) Chicago and North Western Railway Company
(7) Chicago, Burlington & Quincy Railway Company
(8) Chicago Great Western Railway Company
(9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
(10) Chicago, Rock Island and Pacific Railroad Company
(11) Great Northern Railway Company
(12) Illinois Central Railroad Company
(13) The Kansas City Southern Railway Company
(14) St. Louis-San Francisco Railway Company
(15) Soo Line Railroad Company
(16) Union Pacific Railroad Company
(17) Wabash Railroad Company
(18) The Western Pacific Railroad Company
(19) Texas Tank Truck Carriers Association, Inc.
(20) Regular Common Carrier Conference of American Trucking Associations, Inc.